STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: JULY 05, 2022

IN THE MATTER OF:
Appeal Board No. 622947

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective October 3, 2020, on the basis that the claimant voluntarily separated from employment without good cause. The claimant requested a hearing.

By decision filed December 6, 2021 (Appeal Board No. 616563), the Board rescinded the decision of the Administrative Law Judge filed June 17, 2021, insofar as it sustained the initial determination disqualifying the claimant from receiving benefits, effective October 3, 2020, and remanded the case to the Hearing Section for a hearing and a decision on the remanded issue. The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed April 8, 2022 (), the Administrative Law Judge again granted the claimant's application to reopen, granted the employer's application to reopen, and sustained the initial determination.

The claimant appealed the Judge's decision, insofar as it granted the employer's application to reopen and sustained the initial determination, to the Board. The Board considered the arguments contained in the written statement submitted by the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The employer is a company which provides speech and language

services to both private clients and in the public schools. The claimant has worked for the employer over five years as a speech and language pathologist. The claimant worked full-time, 28 to 32 service hours per week, and earned $69.00 per service hour provided. The employer did not guarantee service hours.

The claimant's employment was based upon an employment agreement executed in 2015 and renewed annually. The agreement provided that the claimant was paid on a "fee-for-service" pay structure. The employee would receive one stated service fee. The fee included any associated responsibilities related to providing speech therapy services including direct therapy, session notes, progress reports, special education reviews, advanced preparation work and travel to and from the client.

In the 2019-2020 school year, prior to the pandemic, the claimant was working a full-time caseload, providing therapy services in-person. When a student left the claimant's caseload, the employer would offer the claimant additional clients as replacement. Due to the pandemic, in-person visits were dropped. All sessions became remote.

In April 2020, the claimant's doctor advised the claimant, who was newly pregnant, that remote employment was preferred. In May 2020, the claimant notified her employer that she had reservations about resuming her in-person employment in the fall because she was experiencing a high-risk pregnancy and at risk due to Covid-19. She was due to deliver her child in November 2021.

On or about August 24, 2020, the employer and the claimant discussed her continued employment. It was agreed that the claimant would work remotely on a part-time basis during the upcoming school year. The employer and the claimant also agreed that she would continue with her private clients and take on 13 additional clients for approximately 20 service hours per week.

During the 2020-2021 school year, there was a problem with student attendance at the scheduled remote sessions. The claimant's students were missing approximately 20 percent of their appointments. The employer noticed the problem. The employer offered to reassign additional students to the claimant. The claimant declined the offer expecting that attendance would improve.

When the claimant realized that her earnings for the period from September 16 through September 28, 2020 had dropped due to poor attendance, she spoke with the employer about her no-show clients. On September 28, 2020, the claimant

asked for additional remote clients but was not offered any at that time. The claimant resigned on October 5, 2020, due to not receiving sufficient billable hours. Continued work was available had she not resigned.

A hearing was scheduled for April 22, 2021, at 9:30 am. The employer's first-hand witness fell ill with Covid on April 21, 2021. Her husband notified the Hearing Section of her illness by telephone and a facsimile sent to the Hearing Section on April 21, 2021. He requested an adjournment of the hearing scheduled for the following day. When he was advised that an adjournment would not be granted, he offered a cell phone number for the witness. On April 22, 2021, the Administrative Law Judge did not call the employer's witness at the number provided for the 9:30 a.m. hearing. The employer's witness contacted the Hearing Section at 9:45 a.m. She was told that the hearing had already started, and she could not participate. A decision was mailed and filed on April 29, 2021. The employer requested a reopening on May 3, 2021.

OPINION: The credible evidence establishes that the employer did not participate in the April 22, 2021, hearing because the employer was not contacted by the Administrative Law Judge. The employer provided a number where its witness could be reached. When witness was not called at the time of the hearing, the employer immediately contacted the Hearing Section. After the decision was issued, the employer then requested a reopening in a timely manner. We conclude that the employer has demonstrated good cause for its absence from hearing and that the application to reopen was properly granted.

The credible evidence further establishes that the claimant resigned from her employment when she realized that her earnings were being reduced due to client absenteeism. Although the claimant argues that her resignation was prompted by the employer's failure to pay her for work performed and the failure to offer her additional clients, we reject such contentions as unpersuasive. In so determining, we find it significant that the claimant was employed, as per contract, under a "fee for service" model and had accepted that business model for the duration of her employment. Nothing had changed as to the "fee for service" model. It was the claimant who had made changes to the amount of work she accepted, preferring to work on a part-time, remote basis. The reduction in her pay was not a result of any action on the part of the employer. We note also that the claimant initially declined an offer of more clients when the employer first noticed the high rate of student absenteeism. Though the claimant may not have been offered any additional clients on September 28, 2020, she resigned only a few days later, without

making any further efforts to improve the attendance of the absentee students or making any further requests for more clients.

We are not persuaded by the claimant's argument that she had good cause to resign due to violations of the Fair Labor Standards Act and the Wage Theft Prevention Act. We note, that the Fair Labor Standards Act addresses whether an employer pays overtime to employees in certain professions. (29 USC § 213

[a] [1]). The claimant was not working full-time hours and had no loss of overtime payments. We are also not persuaded by her argument with respect to a violation of the Wage Theft Prevention Act. She did not quit because the employer did not properly report her earnings or failed to provide a regular payday paycheck. The claimant did not resign due to any violation of the Labor Law but rather she resigned due to unhappiness with her earnings. (See Appeal Board No. 587358).

General unhappiness with the terms and conditions of one's employment, particularly where the changes to the terms and conditions are at the claimant's request, does not provide good cause for quitting. Accordingly, we conclude that the claimant separated from her employment under disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is affirmed.

The employer's application to reopen 021-11813 is granted.

The initial determination, disqualifying the claimant from receiving benefits, effective October 3, 2020, on the basis that the claimant voluntarily separated from employment without good cause, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER